83-225

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LARRY VAN EMMERIK, for Himself,
and All Others Similarly Situated,

Petitioner,

v.

MONTANA DAKOTA UTILITIES CO.,
a corporation, et al.,

Respondent,

and

LARRY VAN EMMERIK, for Himself,
and All Others Similarly Situated,

Petitioner,

v.

BLACK HILLS POWER AND LIGHT COMPANY,
et al.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

GEORGE A. BANGS
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
818 St. Joseph Street
Rapid City, South Dakota 57709
(605) 343-1040

GALE E. FISHER
208 Court House Plaza
Sioux Falls, South Dakota 57102
(605) 339-4242

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, does the denial of attorney's fees under 42 U.S.C. 1988 deprive the class action plaintiff of equal protection of the laws?

2. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, and where denial of fees under 42 U.S.C. 1988 is based on the premise that "purely private property right claims are not within the purview of the claims for which attorney's fees are awardable under Section 1988", does such denial of fees offend against the Supremacy Clause of the United States Constitution?

3. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, does the denial of attorney's fees under 42 U.S.C. 1988 deprive the class action plaintiff of property without due process of law?

4. Where the litigation efforts of a class action plaintiff have resulted in a measurable economic benefit of $2,226,000.00 to easily identifiable members of the class of utility consumers, and where the cost of litigation can be shifted to the beneficiaries by assessing same to the utilities which perpetrated the overcharges, does denial of award of attorney's fees violate the Supremacy Clause and the due process clause?

5. Where the facts pleaded in a state court complaint state a claim cognizable under 42 U.S.C. 1983, does a failure to plead said statute bar an allowance of fees under 42 U.S.C. 1988?

6. Where a prevailing plaintiff brings action against state tax officials which fails because of sovereign immunity but motivates and causes corrective action, are attorney fees awardable against the state under 42 U.S.C. 1988?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CONSTITUTION AND STATUTES:

MISCELLANEOUS:

INTRODUCTION

The Defendants in *Van Emmerik v. Montana Dakota Utilities Co., et al.* (Van Emmerik I) are as follows:

Montana-Dakota Utilities Co., a corporation, and Northern States Power Company, a corporation, for themselves and all individuals, partnerships, associations or corporations who or which have since January 1, 1976, engaged in the sales, furnishing or service of gas, electricity, or water to consumers or users in the State of South Dakota.

The Defendants in *Van Emmerik v. Black Hills Power and Light Company, et al.* (Van Emmerik II) are as follows:

Investor Owned Utility Corporations:

Black Hills Power & Light Company; Montana-Dakota Utilties Co.; Northern States Power Co. (Minn.); Northwestern Public Service Co.; Otter Tail Power Co.; Iowa Public Service Co.; and Minnesota Gas Company, d/b/a Cengas;

Municipal Corporations Doing Business As:

Arlington Light Dept.; Beresford Municipal Power Dept.; Brookings Municipal Utilities; Bryant City Light & Power Dept.; Burke Light & Power Dept.; Elk Point Munic. Electric Light Plant; Estelline Munic. Light & Power Dept.; Faith Municipal Light & Power Plant; Flandreau Municipal Electric Plant; Fort Pierre Light & Power Plant; Groton Electric Light & Power Dept.; Hecla Light & Power Dept.; Howard Municipal Power Dept.; Langford Municipal Light Dept.; Madison Municipal Utilities; Miller Municipal Light Dept.; Onida Light & Power Dept.; Parker Municipal Light Dept.; Pierre Munic. Power & Light Dept.; Plankinton Light & Power Dept.; Sioux Falls Munic. Light & Power Dept.; Tyndall Light & Water Plant; Vermillion City Light &

Power Dept.; Volga Municipal Light & Power Dept.; Watertown Municipal Utilities; Wessington Springs Munic. Light & Power; and Winner Utilities;

Rural Electric Cooperatives:

Beadle Electric Cooperative, Inc.; Black Hills Electric Cooperative, Inc.; Bon Homme-Yankton Elec. Ass'n., Inc.; Butte Electric Cooperative, Inc.; Cam Wal Electric Cooperative, Inc.; Clay-Union Electric Corp.; Codington Clark Electric Coop., Inc.; Douglas Electric Cooperative, Inc.; East River Electric Power Coop. Inc.; FEM Electric Association, Inc.; Grand Electric Cooperative, Inc.; H-D Electric Coop., Inc.; Intercounty Electric Assoc., Inc.; Kingsbury Electric Cooperative, Inc.; Lacreek Electric Association, Inc.; Lake Region Electric Assn., Inc.; Lincoln-Union Electric Company; McCook Electric Cooperative, Inc.; Moreau-Grand Electric Cooperative, Inc.; Northern Electric Cooperative, Inc.; Oahe Electric Cooperative, Inc.; Ree Electric Corp., Inc.; Rosebud Electric Cooperative, Inc.; Rushmore Electric Power Cooperative; Sioux Valley Empire Electric Assn.; Spink Electric Co-op., Inc.; Tri-County Electric Assn., Inc.; Turner-Hutchinson Electric Cooperative; Union County Electric Cooperative, Inc.; West River Electric Assn., Inc.; and Whetstone Valley Electric Cooperative.

OPINIONS BELOW

The opinions delivered in the courts below have not yet been reported.

GROUNDS OF JURISDICTION

1. The Judgment sought to be reviewed is that of the Supreme Court of South Dakota in cases numbered 13614 and 13615 entitled *Van Emmerik v. Montana Dakota Utilities Co., et al.* and *Van Emmerik v. Black Hills Power and Light Co., et al.* Such Judgment is dated April 13, 1983.

2. Petition for Rehearing was denied on May 13, 1983.

3. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, does the denial of attorney's fees under 42 U.S.C. 1988 deprive the class action plaintiff of equal protection of the laws?

2. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, and where denial of fees under 42 U.S.C. 1988 is based on the premise that "purely private property right claims are not within the purview of the claims for which attorney's fees are awardable under Section 1988", does such denial of fees offend against the Supremacy Clause of the United States Constitution?

3. Where a class action plaintiff brings litigation which results in a judicial declaration that the State has been collecting excess sales tax from utilities, which excess charges have been passed on under color of state law to the class of utility consumers, and where a 42 U.S.C. 1983 suit in state

court for recovery of such excess charges is dismissed because of an extraordinary retroactive tax increase passed by the legislature, does the denial of attorney's fees under 42 U.S.C. 1983 deprive the class action plaintiff of property without due process of law?

4. Where the litigation efforts of a class action plaintiff have resulted in a measurable economic benefit of $2,226,000.00 to easily identifiable members of the class of utility consumers, and where the cost of litigation can be shifted to the beneficiaries by assessing same to the utilities which perpetrated the overcharges, does denial of award of attorney's fees violate the Supremacy Clause and the due process clause?

5. Where the facts pleaded in a state court complaint state a claim cognizable under 42 U.S.C. 1983, does a failure to plead said statute bar an allowance of fees under 42 U.S.C. 1988?

6. Where a prevailing plaintiff brings action against state tax officials which fails because of sovereign immunity but motivates and causes corrective action, are attorney fees awardable against the state under 42 U.S.C. 1988?

THE STATUTES INVOLVED

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§1 et seq.],

or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

I. SALES TAX LEGISLATION

When the statutes of South Dakota were compiled in SDCL 1967, the following pertinent rates of tax were established:

SDCL 10-45-2—Sale of tangible personal property—3%

SDCL 10-45-6—Utility and communication services—3%

By Chapter 267, South Dakota Laws 1969, Section 10-45-2 was amended by increasing the rate from 3% to 4%, but Section 10-45-6 was not amended.

By Chapter 97, South Dakota Laws 1974, Section 10-45-6 was specifically amended to delete communications services but the tax on utility services was reenacted at 3%.

By Chapter 325, South Dakota Laws 1980, effective May 1, 1980, Section 10-45-2 was amended to raise the rate of tax to 5%. Section 10-45-6 was not amended.

II. EXCESS TAX COLLECTIONS

Commencing with July 1, 1969, the effective date of Chapter 267, South Dakota Laws 1969, the Revenue Department of South Dakota demanded and received from all utility companies a sales tax amounting to 4% of the gross receipts, rather than 3% as specified in the controlling statute.

Commencing May 1, 1980, the effective date of Chapter 325, South Dakota Laws 1980, the Revenue Department of

South Dakota demanded and received from all utility companies a sales tax amounting to 5% of the gross receipts, rather than 3% as specified in the controlling statute. These taxes were passed on to consumers as authorized by SDCL 10-45-22.

III. VAN EMMERIK AND RELATED LITIGATION

A. VAN EMMERIK I

In March, 1979, the Petitioner Van Emmerik, acting for a class consisting of consumers who had paid "sales tax overcharges" during the *next preceding three years*, brought suit against (a) the South Dakota taxing officials, and (b) utility companies as a class who had collected sales tax overcharges from customers. The plaintiff class was certified and two utility companies were served as representatives of the defendant class.

The trial court entered a dismissal of this case based upon the legal theory that the lawful rate of sales tax was 4%, rather than 3%. Upon appeal to the South Dakota Supreme Court this case was reversed and remanded with instructions to dismiss as against the State taxing officials because of sovereign immunity, but to proceed as against the utility companies. (*Van Emmerik v. Montana Dakota Utilities Co., et al,* 298 N.W.2d 804 (S.D. 1980).

B. THE UTILITIES' TAX REFUND CASE

Meanwhile, the six investor owned utilities operating in South Dakota filed refund claims with the Secretary of Revenue, which claims were denied. Upon appeal to the Circuit Court of the Sixth Judicial Circuit the denial was affirmed. Upon appeal to the South Dakota Supreme Court it was determined that the legal rate of tax was 3% and the case was reversed and remanded "for a determination of a credit

or refund pursuant to the provisions of SDCL 10-45-53." (*In the Matter of Sales Tax Refund Applications of Black Hills Power & Light*, 298 N.W.2d 799 (S.D. 1980).

By letter formally filed with the South Dakota Public Utilities Commission these six investor owned utilities had promised to pass on any refunds obtained from the State to the consumers who had actually paid the tax.

It is acknowledged and conceded that these refund applications were filed as the direct result of *Van Emmerik I, supra*. (Opinion below, fn. 2, App. A).

C. VAN EMMERIK II

Meanwhile, on February 14, 1980, Petitioner Van Emmerik commenced a new and separate action on behalf of a class consisting of all consumers who had paid sales tax overcharges since July 1, 1969. Each of the utility companies in the State of South Dakota was individually named as defendant and served with process. Because the underlying question, i.e., the legal rate of sales tax on utility services, was on its way toward determination by the South Dakota Supreme Court in *Van Emmerik I* and the *Sales Tax Refund Application* case, this lawsuit was held in abeyance pending such determination.

On January 23, 1981, the trial court entered an order granting leave to Plaintiff Van Emmerik to file an amended complaint dated December 6, 1980, alleging that the defendant utilities, acting under color of State law, had deprived plaintiff of property without due process of law in contravention of the provisions of 42 U.S.C. §1983 and praying that reasonable attorney's fees and litigation expenses be determined and awarded under 42 U.S.C. §1988. By virtue of SDCL 15-6-15(c) this amendment related back to the date of the original complaint, which was February, 1980.

D. SENATE BILL 40 AND VAN EMMERIK III

As a result of the foregoing litigation, on January 30, 1981, the Fifty-Sixth Legislative Assembly of South Dakota passed and the Governor signed into law Senate Bill 40. By the explicit retroactive provisions thereof the effect of the Act was:

(i) to increase the sales tax on gross receipts of utility companies from 3% to 4% for the period from July 1, 1969 to May 1, 1980, and

(ii) to increase such tax rate from 3% to 5% for the period from May 1, 1980 to the effective date of Senate Bill 40.

By such legislation the legislature sought to and did wipe out all claims against the utility companies and the State by reason of the excess sales tax collections.

Upon application of Petitioner Van Emmerik in original proceedings before that body, the Supreme Court of South Dakota, on February 3, 1981, issued an Alternative Writ of Prohibition restraining the implementation of Senate Bill 40 pending further order of the Court.

On April 15, 1981, the South Dakota Supreme Court handed down its decision dissolving the Writ of Prohibition and overruling all constitutional challenges to Senate Bill 40. (*Van Emmerik v. Janklow, et al.*, 304 N.W. 2d 700 (S.D. 1981)).

Appeal was taken to this Court by Petitioner under Docket No. 81-293. This Court dismissed the appeal for want of a substantial federal question, over the dissent of Justices White and Blackmun. (*Van Emmerik v. Janklow*, appeal dismissed, 454 U.S. 1131, 71 L.Ed. 2d 285, 102 S.Ct. 986.)

Petitioner was the prevailing party in *Van Emmerik I* and *Van Emmerik II*. It was conceded in oral argument before the Supreme Court of South Dakota that the filing of *Van Emmerik I* had prompted the utilities to commence their refund proceedings. *Van Emmerik I* and the refund case were argued on the same day and the decisions thereon were rendered on the same day. The decision in the refund case established that the lawful rate of sales tax on utility services from July 1, 1969 had been 3% and no more. As the direct result of this decision, prompted by Petitioner's efforts, the sales tax surcharge on utility bills in South Dakota was dropped from 5% to 3% on December 1, 1980 and remained at the 3% level until May 1, 1981, when the South Dakota Supreme Court allowed Senate Bill 40 to take effect raising the rate to 5%. Estimates derived from the records of the Revenue Department show that the utility consumers of South Dakota were thereby saved approximately $2,226,000.00 during that 5 month period.

IV. APPLICATION FOR FEES UNDER 42 U.S.C. 1988

On January 27, 1981, prior to the passage of Senate Bill 40, Petitioner filed a Petition for interim attorney's fees in both *Van Emmerik I* and *Van Emmerik II*.

On September 16, 1981, the trial court entered an order denying attorney's fees and dismissing *Van Emmerik I* and *Van Emmerik II*, by reason of Senate Bill 40.

Timely appeals were taken to the Supreme Court of South Dakota and the cases were consolidated for all purposes.

On April 13, 1983, the South Dakota Supreme Court affirmed the denial of attorney's fees in both *Van Emmerik I* and *II*. (*Van Emmerik v. Montana-Dakota Utility Company, et al.* (opinion filed April 13, 1983), (_____N.W.2d _____). Copy of this opinion, not yet published, is

reproduced as Appendix A and it is with reference to this decision that certiorari is sought.

Timely Petition for Rehearing was filed with the South Dakota Supreme Court, but rehearing was denied without further opinion on May 13, 1983. (App. B).

V. THE VAN EMMERIK CAUSES OF ACTION ARE WITHIN THE PURVIEW OF 42 U.S.C. 1983.

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is undisputed that during the period of overcharge the utility companies submitted to their customers bills for utility services with a separately stated surcharge for South Dakota sales tax, e.g., utility services rendered - $100.00, South Dakota sales tax at 5%—$5.00, total—$105.00. The customers had two choices. They could pay the bill as rendered or watch the lights go out all over South Dakota. The utility companies thereby, under color of State law, i.e., under the representation that the lawful State sales tax was 5%, exacted money from the utility customers without due process of law. The tax imposed by the South Dakota legislature was only 3%. Under SDCL 10-45-22 the retailer was authorized to add to the price of utility services the tax imposed by the legislature and no more. "Misuse of power,

possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *U.S. v. Classic,* 313 U.S. 299, 326, 85 L.Ed. 1368, 61 S.Ct. 1031; reh'g denied 314 U.S. 707, 86 L.Ed. 565, 62 S.Ct. 57.

REASONS FOR GRANTING THE WRIT

1. ***The decision of the South Dakota Supreme Court conflicts with the decisions of this Court, and of the U. S. Courts of Appeal as to the proper interpretation of 42 U.S.C. §§1983 and 1988.***

The South Dakota Supreme Court concludes its denial of fees under 42 U.S.C. §1988 with the following statement:

> "Moreover, we held in *Boland v. City of Rapid City, supra,* that *purely private property right claims* are not within the purview of the claims for which attorneys' fees are awardable under §1988. Although appellant's lawsuits may have provided the impetus for the chain of events that culminated in Senate Bill 40, at heart it was an action to recover money, as were the actions in *Boland*." (Emphasis supplied.)

The fact that a civil rights case involves basically financial interests does not preclude attorney fees under Section 1988. *International Oceanic Enterprises, Inc. v. Minton,* 614 F.2d 502 (5th Cir. 1980).

This Court has squarely held that with respect to actions under Section 1983 there is no distinction between personal liberties and property rights. Justice Stewart, writing for the majority, stated eloquently:

> "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Properties do not have rights.

> People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account."
> (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 435, 92 S.Ct. 1113.)

The South Dakota Court grounds its decision upon its prior holding in *Boland v. City of Rapid City*, 315 N.W.2d 496 (S.D. 1982). That case was likewise erroneously decided with respect to attorney's fees. In *Boland* the Supreme Court of South Dakota was concerned with a situation in which the City of Rapid City, following a disastrous flood, had destroyed flood damaged buildings without notice, without hearing and without legal justification. While affirming an award to the wronged property owners for the fair market value of their properties and acknowledging that the taking thereof without just compensation was constitutionally impermissable, the South Dakota Court disallowed attorney's fees with this statement of reason:

> "We do not believe that this expansion of Sections 1983 and 1988 includes condemnation *and inverse condemnation* under color of State law." (Emphasis added.)

The South Dakota Court thereby brought itself into irreconcilable conflict with the decision of this Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed2d 401, 99 S.Ct. 1171. In *Lake Country Estates*, this Court held that an inverse condemnation complaint against a State agency would fall within 42 U.S.C. §1983, thereby supporting federal court jurisdiction under 28 U.S.C. §1343.

The South Dakota Court emphasizes that Section 1983 was not originally pleaded. It overlooks the fact that by statute the amended pleading related back to the date of the original complaint. (SDCL 15-6-15(c)). Additionally, it has been held that failure to plead Section 1983 as a specific ground for recovery does not prevent an award of fees if the facts bring the cause of action within the ambit of Section 1983. *Gumbhir v. Kansas State Board of Pharmacy,* 646 P.2d 1078 (Kan. 1982). See also, *La Raza Unida of Southern Alameda County v. Volpe,* 440 F. Supp. 904 (1977). Of course, in those cases where the jurisdiction of the United States District Court is invoked and is dependent upon 42 U.S.C. 1983, then it would be necessary under federal rules to plead the source of jurisdiction. In state court, however, the only question is whether or not the facts as pleaded make it "an action or proceeding to enforce a provision of Section 1983". *New York Gas Light Club, Inc. v. Carey,* 447 U.S. 54 (1980), 64 L.Ed.2d 723, 100 S.Ct. 2024.

Through the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988), Congress has sought to achieve private enforcement of Federal civil rights statutes by giving class action Plaintiffs effective access to the judicial process. (H.R. 94-1558, 94th Congress, 2d Session). The legislative history further reveals: "...after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed." (Id., p. 7). In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), 60 L.Ed.2d 560, 99 S.Ct. 1946, in Footnote 3(b) the Court quotes the legislative history of Section 1988 as follows:

> "All of these civil rights laws (referred to in Section 1988) depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which

these laws contain."

In the case at bar, the unlawful surcharges were terminated on December 1, 1980, as a result of Petitioner's efforts. The subsequent action of the legislature served to protect the State and the utility companies from proceedings for recoupment, but should not deprive Petitioner of his right to a fee award as a prevailing plaintiff. (Compare, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), and *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir. 1973), *Williams v. Miller*, 620 F.2d 199 (8th Cir. 1980).

The Petitioner is entitled under the Supremacy Clause to have the federal law as declared by this Court enforced in the state courts of South Dakota. Justice Powell has recently observed that Section 1983 cases constitute "the most explosive source of federal jurisdiction." (Powell, Are the Federal Courts Becoming Bureaucracies, 68 ABAJ 1370, November, 1982.) Failure of the South Dakota Supreme Court to follow the decisions of this Court will have the unfortunate result of increasing the overcrowded dockets of the federal courts. Any prudent attorney in South Dakota will seek venue in the federal court for any property rights case fitting within Section 1983, even though such case might more readily be tried in state court, because attorney's fees under Section 1988 are awardable in the federal courts but not in the state courts of South Dakota.

The error in the interpretation by the South Dakota Court of Section 1983 and Section 1988 is clearly apparent from the following trilogy of cases decided by this Court in 1980:

a. In *New York Gas Light Club, Inc. v. Carey, supra*, the Court upheld the right of a plaintiff to attorney fees under Section 1988 even though the relief was granted in a related state administrative proceeding. In Footnote 6 of the opinion by Justice Blackmun it is observed that "the existence of an incentive to get into federal court, such as the availability of

a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state remedies." Similarly, in the case at bar the holding below will ensure that residents of South Dakota will resort to the federal court whenever possible by reason of the availability of a fee award which is not available in the state courts of South Dakota.

b. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), 65 L.Ed.2d 555, 100 S.Ct. 2502, this Court held squarely that fees under Section 1988 are awardable in state court proceedings. In Footnote 13 of Justice Brennan's opinion for the Court it is stated:

> "If fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts. Moreover, given that there is a class of cases stating causes of action under § 1983 but not cognizable in federal court absent the $10,000 jurisdictional minimum of § 1331(a), see n 6, supra, some plaintiffs would be forced to go to state courts, but contrary to congressional intent, would still face financial disincentives to asserting their claimed deprivations of federal rights."

This prediction has now come to pass in South Dakota. So long as fees are denied in the South Dakota Court, complainants will inevitably seek federal venue of Section 1983 claims.

c. In *Maher v. Gagne*, 448 U.S. 122 (1980), 65 L.Ed.2d 653, 100 S.Ct. 2570, this Court held that where substantial constitutional violations are alleged but not adjudicated, the plaintiff is still entitled to fees, even though the controversy is settled by consent decree. In that case the contention was advanced that fees should be awarded only where the cause

of action arises from violation of civil rights or equal rights. This contention was flatly rejected.

Most recently, this Court has held that where a plaintiff prevails upon some but not all claims asserted, attorneys fees are still awardable, although that fact should be taken into account in fixing the amount of such fees. *Hensley v. Eckerhart,* May 16, 1983, 51 L.W. 4552, _____U.S. _____, _____ L.Ed.2d _____, _____S.Ct. _____.

The South Dakota Court acknowledged that Van Emmerik was a prevailing party but denied any award of fees because of the retroactive legislation which deprived the petitioner and the class of consumers of the fruits of his efforts.

2. ***The decision below cannot be sustained on any independent, non-federal grounds.***

a. The undisputed facts bring the case within the ambit of 42 U.S.C. § 1983. The basic wrong complained of in the Van Emmerik litigation was the fact that the taxing officials of South Dakota for a period of more than ten (10) years had demanded and collected from utility companies a sales tax in excess of the amount levied by the legislature. The utility companies, in turn, were authorized by law and did pass on to the consumer class such excess sales tax charges. The consumer class had no recourse against the taxing officials because they were not taxpayers within the meaning of the refund laws and were therefore barred by the doctrine of sovereign immunity from suing the State or its taxing officials in the Courts of South Dakota (*Van Emmerik I,* supra.).

Left with no recourse under state law, the consumer class had to pay these illegal overcharges under penalty of having their light and heat cut off. Thus they were, under color of state law, deprived of property without due process.

b. Petitioner is a "prevailing party" within the meaning of 42 U.S.C. § 1988. The statute in question reads in pertinent part:

> "In any action or proceeding to enforce a provision of Section 1983 the court, in its discretion, may allow the prevailing parties, a reasonable attorney's fee as part of the costs."

As a result of the litigation commenced by Van Emmerik, the utility companies felt compelled to, and did, file refund claims against the State. The South Dakota Supreme Court declared the applicable lawful rate of tax to be 3% and no more. (*In the Matter of Sales Tax Refund Applications of Black Hills Power and Light,* supra.). Immediately thereafter, the utility companies reformed their billing procedures and reduced the sales tax surcharge to the legal rate of 3%. True, the judicial relief was granted not in the Van Emmerik litigation but in the sales tax refund case brought by the utilities. However, it is obvious from the chronology of events, and it was conceded by counsel for the utilities in oral argument before the South Dakota Supreme Court, that *Van Emmerik I* had prompted the utilities to commence the action for refund. (Opinion below, ftn. 2, Appendix A.)

The United States courts of appeal in cases construing Section 1988 and other fee-shifting statutes of similar wording have achieved a remarkable degree of unanimity in holding that fees are allowable where the "prevailing party" is the motivating force or "catalyst" in achieving the desired relief. For example:

FIRST CIRCUIT: *Nadeau v. Helgemoe,* 581 F.2d 275 (1978).

SECOND CIRCUIT: *Cohen v. West Haven Board of Police Commissioners,* 638 F.2d 496 (1980).

THIRD CIRCUIT: *Thomas v. Honeybrook Mines, Inc.,* 428 F.2d 981 (1971) (common fund theory).

FOURTH CIRCUIT: *McManama v. Lukhard,* 616 F.2d 727 (1980).

FIFTH CIRCUIT: *Robinson v. Kimbrough,* 620 F.2d 468 (1980).

SIXTH CIRCUIT: *Northcross v. Board of Education of Memphis,* 611 F.2d 624 (1979).

SEVENTH CIRCUIT: *Muscare v. Quinn,* 614 F.2d 577 (1980).

EIGHTH CIRCUIT: *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421 (1970).

NINTH CIRCUIT: *American Constitutional Party v. Munro,* 650 F.2d 184 (1981).

TENTH CIRCUIT: *Gurule v. Wilson,* 635 F.2d 782 (1980).

D. C. CIRCUIT: *Cuneo v. Rumsfeld,* 553 F.2d 1360 (1977).

c. There are no "special circumstances" which would justify a denial of fees. This Court has held that fees should be allowed as a matter of course under this and similar statutes unless there are "special circumstances" which would render such an award unjust. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), 19 L.Ed.2d 1263, 88 S.Ct. 964.

In the case at bar, the special circumstances all point toward allowance rather than denial of attorney's fees. The efforts of Van Emmerik have resulted in a monetary saving to the utility consumers of South Dakota of approximately $2,226,000.00 during the period December 1, 1980, to May 1, 1981. During that period, as a direct result of the Van Emmerik litigation, the sales tax surcharge was reduced from 5% to 3% with the resultant saving as stated. Absent an award of attorney's fees, the burden of achieving this result for the class will fall solely upon Van Emmerik. The other members of the class will be unjustly enriched at his expense, and the utility companies which cooperated with the State of

South Dakota taxing authorities in inflicting the wrong will go scot free. This runs totally against the grain of this Court's opinion in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), 24 L.Ed.2d 593, 90 S.Ct. 616.

d. The grounds for denial of attorney's fees as articulated by the South Dakota Supreme Court are in conflict with the decisions of this Court and of the several United States courts of appeal. The South Dakota Court articulates but two reasons for denial of fees under Section 1988:

> (a) "Because the original Complaint in Van Emmerik II did not plead 42 U.S.C. § 1983, it is impossible to conclude that Appellant (Petitioner) prevailed on a 42 U.S.C. § 1983 cause of action." This begs the question. The question under the statute is whether the Van Emmerik litigation was "an action or proceeding to enforce a provision of Section 1983." Clearly it was such an action or proceeding whether or not Section 1983 was specifically pleaded in the original Complaint. Under South Dakota law, which happens to be copied from Rule 15(c) F.R.C.P., the amendment of the Complaint related back to the original filing thereof.
>
> (b) The South Dakota Court holds that "purely private property right claims are not within the purview of claims for which attorney's fees are awardable under Section 1988." The fallacy of that reasoning and its irreconcilable conflict with the decisions of this Court have been treated above.

3. ***The decision below impinges upon the Supremacy Clause, the equal protection clause, the privileges and immunities clause and the due process clause of the United States Constitution.***

Congress has established a national policy of fee-shifting applicable to a defined class of actions—those involving enforcement of any provision of 42 U.S.C. 1983. The purpose of this policy is to provide meaningful access to the courts, both state and federal, for private citizens whose federally guaranteed rights have been infringed under color of state law. This Congressional purpose is thwarted by the decisions of the South Dakota Supreme Court which announce a rule of law disallowing attorney's fees under 42 U.S.C. 1988 in cases involving private property rights and inverse condemnation. If allowed to stand, this South Dakota version of the American rule on attorney fees will:

(a) Deprive prevailing plaintiffs in the South Dakota state courts of equal protection under a Congressional Act;

(b) deprive prevailing plaintiffs in the South Dakota state courts of privileges available in the state courts of other states;

(c) deprive prevailing plaintiffs in the South Dakota state courts of due process rights afforded to others by Congressional Act;

(d) ensure that every Section 1983 case will be brought in the United States District Court of South Dakota in preference to the state courts.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of South Dakota.

Respectfully submitted,

GEORGE A. BANGS
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
818 St. Joe Street; P.O. Box 2670
Rapid City, South Dakota 57709

GALE E. FISHER
208 Court House Plaza
Sioux Falls, South Dakota 57102
Attorneys for Petitioner

Date: August 9, 1983

APPENDIX

#13614 & #13615-a-RLW

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

LARRY VAN EMMERIK, for Himself,
and All Others Similarly Situated, *Plaintiff and Appellant,*
v.
MONTANA DAKOTA UTILITIES CO.,
a Corporation, et al, *Defendants and Appellees,*
and
LARRY VAN EMMERIK, for Himself,
and All Others Similarly Situated, *Plaintiff and Appellant,*
v.
BLACK HILLS POWER AND LIGHT
COMPANY, et al, *Defendants and Appellees.*

* * * *

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE ROBERT A. MILLER
Judge

GEORGE A. BANGS of
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
Rapid City, South Dakota

GALE A. FISHER, P.C.
Sioux Falls, South Dakota Attorneys for Appellant.

#13614 & #13615

BRENT A. WILBUR of
MAY, ADAM, GERDES & THOMPSON
Pierre, South Dakota Attorneys for Appellees
Investor Owned Utilities

ROBERT B. FRIEBERG of
FRIEBERG, FRIEBERG & PETERSON
Beresford, South Dakota — Attorneys for Appellees Municipal Corporations

ALAN F. GLOVER
Brookings, South Dakota

On the brief;
VINCE J. PROTSCH
Howard, South Dakota

LEO P. FLYNN
Milbank, South Dakota — Attorneys for Appellees Rural Electric Cooperatives

* * * *

ARGUED September 10, 1982
OPINION FILED April 13, 1983

#13614 & #13615

APPEAL FROM THE CIRCUIT OF THE
SIXTH JUDICIAL CIRCUIT

WOLLMAN, Justice

This is a consolidated appeal from orders denying attorneys' fees and summary judgments dismissing appellant's actions upon the merits with prejudice. We affirm.

In March of 1979, appellant commenced a class action (Van Emmerik I) seeking a refund of sales taxes from the State and retailers of utility services for the collection of taxes in excess of the rate imposed by SDCL 10-45-6. In June of 1979, several investor-owned utilities brought administrative

proceedings seeking a refund of excess sales taxes paid. In February of 1980, appellant commenced a separate action (Van Emmerik II) against all investor-owned utility corporations, all municipal corporations, and all rural electric cooperatives, seeking a declaration that the legal rate of the tax was three percent and asking for a refund or credit for sums illegally collected.

The circuit court, determining that the State had not collected a sales tax in excess of that imposed by statute, rendered judgment denying the relief sought in the investor-owned utilities case and subsequently entered an order dismissing appellant's complaint in Van Emmerik I. Both appellant and the investor-owned utilities appealed to this court. In Matter of Sales Tax Refund Applications, 298 N.W.2d 799 (S.D. 1980), we held that the sales tax rate imposed by SDCL 10-45-6 was three percent and that since 1969 the State had collected a sales tax in excess of that amount imposed by statute. We accordingly reversed and remanded for a determination of a refund or credit in favor of the utilities. In Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980), we concluded that the doctrine of sovereign immunity prevented appellant, either as a representative of his class or in his individual capacity, from having standing to seek a refund from the State; we also held that appellant was entitled to proceed against the utilities for derivative relief. In January of 1981, appellant filed a petition for interim attorney fees in both Van Emmerik I and Van Emmerik II. The circuit court allowed appellant to file an amended complaint in Van Emmerik II. This amended complaint alleged that the utilities, acting under color of state law, had deprived appellant of property without due process of law in violation of 42 USC 1983 and that appellant was entitled to attorney fees under the provisions of 42 USC 1988.

Senate Bill 40 was enacted by the 1981 Legislature and signed by the Governor on January 30, 1981, as an emergen-

cy act in effect as of that date. Senate Bill 40 raised the tax rate on utility services to four percent retroactively from May 1, 1980, to July 1, 1969, and to five percent retroactively from the effective date of the act to May 1, 1980. Senate Bill 40 specifically validated and ratified collection of taxes at these rates prior to the adoption of the bill. We granted an alternative writ of prohibition ordering the State to desist and refrain from acting pursuant to the bill until further order of this court. In April of 1981, we upheld the constitutionality of Senate Bill 40. State *ex rel.* Van Emmerik v. Janklow, 304 N.W.2d 700 (1981)(*appeal dismissed*, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 285 (1982)).

The circuit court subsequently entered summary judgment against appellant in his action to obtain a sales tax refund from the utility companies and on his motion for interim attorneys' fees. The only issue presented in this appeal is whether appellant's efforts in Van Emmerik I and Van Emmerik II entitle him to an award of attorneys' fees.

The general rule in the United States is that absent statute or enforceable contract, litigants pay their own attorneys' fees. Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). We have consistently followed this rule. See, e.g., Noll v. Brende, 318 N.W.2d 319 (S.D. 1982); Matter of Estate of Weikum, 317 N.W.2d 142 (S.D. 1982); Boland v. City of Rapid City, 315 N.W.2d 496 (S.D. 1982); Scherf v. Myers, 258 N.W.2d 831 (S.D. 1977); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976); Tracy v. T & B Construction Co., 85 S.D. 337, 182 N.W.2d 320 (1970); DuPratt v. Black Hills Land and Abstract Co., 81 S.D. 637, 140 N.W.2d 386 (1966); Dodds v. Bickle, 77 S.D. 54, 85 N.W.2d 284 (1957); Carlson v. City of Faith, 75 S.D. 432, 67 N.W.2d 149 (1954); Calmenson Clothing Co. v. Kruger, 66 S.D. 224, 281 N.W. 203 (1938). This principle is incorporated into our statutory law. *See*

SDCL 15-17-6; SDCL 15-17-7.[1] Appellant contends, however, that his case falls within one of the exceptions to this principle and also falls within the Federal Civil Rights Act.

One exception to the rule awarding attorneys' fees is the common fund doctrine. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882). This exception allows an award of attorneys' fees from a common fund when a plaintiff, usually on behalf of a class, has successfully maintained an action that benefits a group of others in the manner that it benefits himself. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). This exception prevents unjust enrichment by requiring those who obtained benefit from the plaintiff's efforts to contribute equally to the litigation expenses. *Mills, supra.*

---

1. SDCL 15-17-6 provides:

> The compensation of attorneys and counselors at law for service in civil and criminal actions and proceedings must be left to the agreement, express or implied, of the parties.

SDCL 15-17-7 provides:

> The court may allow attorneys' fees as costs for or against any party to an action only in the cases where the same is specifically provided by statute, but nothing herein shall abridge the power of the court to order payment of attorneys' fees in all cases of divorce, annulment of marriage, or for separate maintenance and alimony, where the allowance of the same before or after judgment shall seem warranted and necessary to the court. Nor shall anything herein abridge the power of the court to allow attorneys' fees from trusts administered through the court.

Application of the common fund exception is appropriate when the classes of persons benefited by the lawsuit are small in number easily identifiable and the benefits can be traced with some accuracy. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. at 265, 95 S.Ct. at 1625, 44 L.Ed.2d at 157, n.39. "[T]he criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." Boeing Co. v. Van Gemert, *supra* at 479, 100 S.Ct. at 749, 100 S.Ct. at 749, 62 L.Ed.2d at 682.

Appellant contends that his commencement of Van Emmerik I was the catalyst for the utilities to commence their refund case and that his efforts in Van Emmerik I and Van Emmerik II created two funds.[2] "Fund I" represents approximately fifteen million dollars, the amount that appellant claims was to be refunded or credited as a result of Matter of Sales Tax Refund, *supra*, and Van Emmerik v. State, *supra*. "Fund II" represents approximately $2,226,000, the amount appellant estimates was saved by the utilities, reducing their rates from five percent to three percent from December of 1980 to May of 1981.

In its order denying attorneys' fees, the trial court stated that appellant "neither prevailed on the merits nor established a fund from which a reward can be made." Although we believe that appellant prevailed on the merits in Van Emmerik I, at least in the sense of obtaining judicial vindication of his claim, we agree that Senate Bill 40 precluded the establishment of what appellant has characterized as Fund I.

---

2. During oral argument, counsel for one of the utility companies conceded that Van Emmerik I had prompted the utilities to commence the action for a refund.

Likewise, we can hardly characterize what appellant refers to as "Fund II," the amount of which is disputed by the utility companies, as a "lump-sum judgment." Boeing, *supra*. In short, there is in existence no such fund. Accordingly, we cannot award attorneys' fees under the common fund exception. *See generally,* Annot., 89 A.L.R.3d 690 (1979).

Appellant urges us to apply another exception to the American rule, the so-called substantial benefit rule, which, as summarized by the United States Supreme Court in the Mills case, supra, permits:

> reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced, in share-holders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one share holder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor.

396 U.S. at 394, 90 S.Ct. at 626, 24 L.Ed.2d at 607 (footnote omitted).

This rule has been applied by the California courts to award attorneys' fees against public entities. *See, e.g.*, Mandel v. Hodges, 54 Cal.App.3d 596, 127 Cal. Rptr. 244 (1976); Knoff v. City and County of San Francisco, 1 Cal. App.3d 184, 81 Cal. Rptr. 683 (1969). Inasmuch as we have already held that the State was immune from suit for a refund of the alleged overpayment of taxes, Van Emmerik v. State, *supra*, we are not disposed to hold the State liable for

attorneys' fees. In Carlson v. City of Faith, *supra*, the Court noted that the purpose of the statute (now SDCL 15-17-18) that authorizes the award of attorneys' fees in suits by taxpayers to recover on behalf of a governmental entity wrongfully expended public funds is "to make the aggressive taxpayer whole and to avoid imposing on him the penalty of personally paying his attorneys in an action brought in behalf of all other taxpayers to redress a public wrong." 75 S.D. at 436-37, 67 N.W.2d at 151. We note that the Court went on to limit the source of funds out of which such an award may be made to those amounts actually recovered under the judgment of recoupment, thus negating any concept of an open-ended recovery based upon the benefit conferred by the vindication of the statutes prohibiting self-dealing by public officials.

Likewise, we see no benefit accruing to the utilities as a result of appellant's law suit. As pointed out by Justice Fosheim in his opinion for the Court in Van Emmerik v. State, *supra*, the utilities may pass the sales tax on to their customers. The record before us does not indicate that this was not done. That being the case, the utilities can hardly be said to have benefited in any substantial way from appellant's attack on the rate of sales tax being charged. Likewise, the utilities cannot be said to have been guilty of wrongdoing in following the erroneous directives of the Department of Revenue following the 1969 amendments to the sales tax statutes. Thus the corporate wrongdoing and the substantial benefit cases, see e.g., Mills, supra, and Boeing, supra, are inapposite.

Appellant contends that the Van Emmerik litigation benefited the public because it is in the public interest that state officials be called to account when their actions are not within the bounds of law. The United States Supreme Court in Alyeska Pipeline Co. v. Wilderness Society, *supra*, considered the issue of awarding attorneys' fees for public in-

terest litigation in the federal courts and rejected this private-attorney-general exception. The Court reasoned that it would not invade Congress' province and allow the federal courts "to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." Alyeska, *supra* at 269, 95 S.Ct. at 1627, 44 L.Ed.2d at 159-60. As we have already pointed out, this Court in Carlson v. City of Faith, *supra*, impliedly rejected the concept of an extra-statutory award of attorneys' fees for the redress of a public wrong. Moreover, we find persuasive the holding of the Court in *Alyeska*, and we apply it to the cases before us. In so doing, we follow the lead of the Supreme Court of Illinois. Hamer v. Kirk, 64 Ill.2d 434, 356 N.E.2d 524 (1976).

Appellant also contends that he prevailed under 42 U.S.C. § 1983[3] of the Federal Civil Rights Act, and is therefore entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.[4]

---

3. 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 42 U.S.C. 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS,"....In any action or pro-

Appellant, however, did not amend his complaint to include this cause of action until after our decision was rendered in State v. Van Emmerik, *supra*, and Van Emmerik II was dismissed at the trial level subsequent to our decision in State, *ex rel.* Van Emmerik v. Janklow, *supra*. It is impossible, therefore, to conclude that appellant prevailed on a 42 U.S.C. § 1983 cause of action. Accordingly, appellant is not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. Moreover, we held in Boland v. City of Rapid City, *supra*, that purely private property right claims are not within the purview of the claims for which attorneys' fees are awardable under § 1988. Although appellant's lawsuits may have provided the impetus for the chain of events that culminated in Senate Bill 40, at heart it was an action to recover money, as were the actions in *Boland*.

The orders denying attorneys' fees and the summary judgments are affirmed.

FOSHEIM, Chief Justice and MORGAN, Justice concur.

DUNN and HENDERSON, Justices, dissent.

#13614 & #13615

DUNN, Justice (dissenting).

To the extent the majority opinion denies attorney fees under the "substantial benefit rule" as defined in Mills v. Electric Auto-lite Co., 396 U.S. 375, 394, 90 S.Ct. 616, 626,

---

ceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

24 L.Ed.2d 593, 607 (1970), I must respectfully dissent.

My review of this case convinces me that the public did receive a substantial benefit as a result of the litigation instituted in Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980). The majority opinion notes in footnote 2 that this litigation prompted utility companies to seek sales tax refunds from the South Dakota Department of Revenue for sales tax collected in excess of that statutorily authorized. Although the refund was ultimately denied as a result of our decision in State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 700 (1981) *cert. den.* 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 285 (1982), tax savings were, nonetheless, experienced by South Dakota taxpayers. During the period of December of 1980, to May of 1981, the taxpayers of South Dakota felt the rate of sales tax on utility services decrease from five percent to the legal three percent rate. As noted in the majority opinion, this resulted in a savings to South Dakota taxpayers and utility companies of approximately $2,226,000.

SDCL 15-17-18 authorizes the award of attorney fees in suits brought by taxpayers to recover public funds which have been wrongfully expended. While we note the statute deals with the funds expended by cities, school districts and counties, we still find the rationale stated therein to be persuasive in the case at hand. We noted in Carlson v. City of Faith, 75 S.D. 432, 436-37, 67 N.W.2d 149, 151 (1954), that reimbursing attorney fees, costs and expenses was intended "to make the aggressive taxpayer whole and to avoid imposing on him the penalty of personally paying his attorneys in an action brought in behalf of all other taxpayers to redress a public wrong."

The majority would have us read the rationale provided in *Carlson, supra,* narrowly and deny recovery of attorney fees because no refund was actually made to the public treasury

in this case. While a refund was blocked in this case in *State ex rel. Van Emmerik, supra,* the public still received an "equitable refund" in the amount of $2,226,000 which they received in the form of lower utility sales tax bills. This is an amount actually recovered and saved by the public as a result of this litigation. While acknowledging this benefit to the public, the majority opinion still concludes the proponents of this case should bear the entire cost of the litigation. In my mind this is inequitable and it violates the rationale provided in *Carlson, supra,* by "penalizing" the taxpayer for bringing the action.

I believe the attorneys should be compensated for their services in this litigation and I suggest the following alternatives to accomplish this end. First, I would suggest payment could be made from sales tax revenues already collected from utility customers. Contrary to the majority's characterization of this approach as holding the State liable, this would simply be a payment by the taxpaying public for services rendered. In effect, it would be an allocation from sales tax collected from the public for attorney fees incurred. While this would temporarily result in utility sales tax collections below that statutorily authorized, it would be a small price to pay for the estimated $2,226,000 benefit received. My second alternative would not reduce the utility sales tax collection at all. Here, I would suggest that utility customers be temporarily billed for the attorney fees awarded as an add-on to the utility sales tax. Spread across the consuming public this would mean only pennies in temporary increases as compensation for approximately $2,226,000 in tax savings. Moreover, it would preserve our position as stated in *Carlson, supra,* which is to avoid penalizing citizens who protect the public interest by awarding them attorney fees when they are successful in their efforts.

I am authorized to state that Justice Henderson joins in this dissent.

SUPREME COURT OF SOUTH DAKOTA
Office of
Gloria J. Engel, Clerk
Dorothy A. Smith, Deputy
Pierre 57501

May 18, 1983

Mrs. Mary L. Erickson
Hughes County Clerk of Courts
Hughes County Courthouse
Pierre, South Dakota 57501

Re: #13614, #13615, both titled:
Larry Van Emmerik, etc. vs.
Montana Dakota Utilities Co., et al.
Your File No. 8-154

Dear Mary:

Please be advised that the petition for rehearing has been denied.
In the above matters(s), herewith are the following:

__X__ Remittitur	__X__ Record on Appeal
_____ Certified copy of opinion of the Court handed down on April 13, 1983	_____ Record on Appeal _____

Kindly acknowledge receipt of each of the foregoing items.

Very truly yours,
Dorothy A. Smith

copies: Mr. Gale E. Fisher
Mr. George A. Bangs
Mr. Brent A. Wilbur
Mr. Robert Haeder
Mr. Ellsworth F. Wilkinson
Mr. David E. Morrill
Mr. Leo P. Flynn
Mr. Robert B. Frieberg
Mr. Alan F. Glover
Mr. Vincent Protsch
Mr. J. W. Grieves

State of South Dakota) In Circuit Court
)SS.
County of Hughes) Sixth Judicial Circuit

* *

LARRY VAN EMMERICK, et al., *
Plaintiff, *
-vs- *
MEMORANDUM DECISION
BLACK HILLS POWER & LIGHT, *
et al., *
Defendant. *

* *

FACTS

The present action had its origin in litigation commenced by plaintiff in 1979. Plaintiff originally instituted a class action seeking a one percent sales tax refund from the State of South Dakota. Plaintiff alleged that the sales taxes collected since 1969 exceeded the statutory rate of SDCL 10-45-6. Shortly thereafter, certain investor-owned utilities commenced an administrative action seeking the same one percent refund. This Court denied relief to both plaintiff and the utilities, however, holding that the state had not collected a sales tax in excess of the statutory rate.

Plaintiff and the investor-owned utilities then took separate appeals to the South Dakota Supreme Court. In the appeal of the investor-owned utilities, the Court held that the state had collected a sales tax on utilities in excess of the statutory amount since 1969. The Court accordingly reversed and remanded the case to this Court for determination of the amount of refund or credit due the utilities. *In the Matter of*

the Appeal of the Sales Tax Refund Applications of Black Hills Power & Light Co., 298 N.W.2d 799 (S.B. 1980).

Plaintiff's appeal to the Supreme Court was decided the same day. In that case the Court held that due to the doctrine of sovereign immunity, plaintiff did not have standing to seek a refund from the state in either an individual capacity or as a representative of the class. The Court did hold, however, that plaintiff was entitled to seek a refund from defendant utility companies who had collected the excessive tax. *Van Emmerick v. State,* 298 N.W.2d 804 (S.D. 1980). Thus, plaintiff commenced the present action seeking the tax refund from all investor-owned utilities, municipal corporations which provided utility service to consumers, and rural electric cooperatives. Plaintiff also requested that this Court grant interim attorneys' fees.

Following remand of both appeals to this Court and during the pendency of hearings thereon, the Legislature enacted Senate Bill 40 into law. This bill retroactively raised the utility sales tax to the amount which had been collected by the utility companies since 1969.

Plaintiff then commenced an original proceeding before the South Dakota Supreme Court seeking writs of prohibition and mandamus to restrain the state from implementing Senate Bill 40 and to force the payment of refunds. The Court upheld the constitutionality of the bill, however, and dismissed plaintiff's petitions. *State ex rel Van Emmerick v. Janklow,* 304 N.W.2d 700 (S.D. 1981).

Still pending before this Court is plaintiff's action seeking a sales tax refund from the defendant utility companies and plaintiff's motion for interim attorneys' fees. Defendants have moved for summary judgment. After reviewing the file, the decisions of the Supreme Court, and the briefs and authorities submitted by counsel, this Court is of the opinion

that defendants' motion for summary judgment should be granted and plaintiff's motion for attorneys' fees denied.

DECISION

A. Summary Judgment

Defendants contend that based upon the Supreme Court's decision in *State ex rel v. Janklow,* supra, they are entitled to summary judgment as a matter of law on plaintiff's action for a sales tax refund. This Court agrees.

In that case, the Court upheld the constitutionality of Senate Bill 40 despite plaintiff's arguments to the contrary. This bill retroactively raised the utility sales tax to the amount which defendants had erroneously collected since 1969. In making this decision, the Court stated:

> "To accept petitioner's argument would mean that while the State exercises sovereign immunity beyond the three year limitation of SDCL 10-45-53 for erroneously imposing a sales tax, the conduit (utility) of that tax bears full exposure to the consumer (petitioner) for the overpayment passed on, even though the conduit not only retained nothing therefrom, but actually bore the administrative expense to collect and remit the tax. Conversely, the consumer who shared in whatever benefit the tax funded could nevertheless effect a full refund from the conduit, but nothing directly from the sovereign that erroneously imposed and received it. Insistence that retailers assume such a risk, whether pursuant to an express or an implied contractual obligation, *would be patently unreasonable.* Id. at 707 (emphasis added)."

Thus, it is the opinion of this Court that all sales tax complained of in plaintiff's complaint for which he seeks a

refund were rendered legally collected by Senate Bill 40. Defendants are no longer liable for any refund.

This conclusion is also supported by the Supreme Court's holding that plaintiff's remedy was only *derivitive* of the right of the utilities to seek a refund from the state. *In the Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power & Light Co.*, supra. As such, the validity of plaintiff's claim for a refund is dependent upon the defendants' ability to obtain a refund from the state. See *Budahl v. Gordon & David Associates*, 287 N.W.2d 489, 493 (S.D. 1980). Since defendants can no longer obtain a sales tax refund from the state in light of Senate Bill 40, neither can the plaintiff recover a similar refund from the defendants. Thus, plaintiff has no cause of action against defendants for sales tax refund.

B. Interim Attorneys' Fees

Also pending before this Court is plaintiff's motion for interim attorneys' fees. Plaintiff filed this motion after the Supreme Court's decision in *Van Emmerick v. State*, supra,[1] but before the Court's decision in *State ex rel. Van Emmerick v. Janklow*,[2] supra. It is the opinion of this Court that this subsequent decision renders the motion for interim attorney's fees moot.

Plaintiff correctly contends that an award of interim attorneys' fees is proper in certain class action suits. See *Bradley v. Richmond School Board*, 416 U.S. 696 (1974);

---

1. Wherein the Supreme Court held that plaintiff could seek a refund from the defendant utility companies, but lacked standing to proceed directly against the state.

2. Wherein the Court upheld the validity of Senate Bill 40 which retroactively raised the sales tax.

Annot., 38 A.L.R.3d 1386 (1971). Defendants argue, however, that such an award is not proper when the plaintiff as representative of the class has neither prevailed on the merits nor established a fund from which to make such an award. This Court agrees with the defendants.

The plaintiff, throughout these proceedings, has been seeking a sales tax refund for his benefit and the benefit of all utility consumers. The enactment of Senate Bill 40 and the Supreme Court's subsequent decision upholding its validity, however, eliminated the possibility of any such refund. Clearly, plaintiff did not prevail on the merits of his claim.

In addition to eliminating plaintiff's claim for a refund, the bill also eliminated any funds out of which attorney's fees could be awarded by retroactively raising the sales tax to the amount previously collected. Thus, there exists no funds from which this Court can award attorneys' fees.

In *Cobb v. Milwaukee County*, 208 N.W.2d 848 (Wis. 1973) the Wisconsin Supreme Court denied any recovery of attorneys' fees in a taxpayers' suit because there was no recovery of a sum certain or a liquidable asset out of which attorneys' fees could be awarded. *See also* Annot., 89 A.L.R.3d 690 (1979). Similarly, Senate Bill 40 eliminated any funds out of which attorneys' fees could be awarded in the instant case.

CONCLUSION

Based upon the foregoing, defendants' motion for summary judgment is granted and plaintiff's motion for interim attorneys' fees is denied.

Brent Wilbur, counsel for the investor-owned utilities, is directed to prepare an order consistent with this opinion.

Dated this 11th day of August, 1981.

BY THE COURT:

/s/ Robert A. Miller

Robert A. Miller
Presiding Circuit Judge

ATTEST:

Clerk of Courts

(SEAL)

No. 83-225

In The
Supreme Court of the United States
October Term, 1983

LARRY VAN EMMERIK, for Himself, and
All Others Similarly Situated,
Petitioner,

vs.

MONTANA DAKOTA UTILITIES CO.,
a corporation, et al.,
Respondents,

and

LARRY VAN EMMERIK, for Himself and
All Others Similarly Situated,
Petitioner,

vs.

BLACK HILLS POWER AND LIGHT COMPANY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF SOUTH DAKOTA

BRENT A. WILBUR
MAY, ADAM, GERDES & THOMPSON
503 South Pierre Street
Pierre, South Dakota 57501
(605) 224-8803

ROBERT B. FRIEBERG
Box 511
Beresford, South Dakota 57004
(605) 763-2107

LEO P. FLYNN
Box 505
Milbank, South Dakota 57252
(605) 432-6611

Attorneys for Respondents

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

No. 83-225

In The

Supreme Court of the United States

October Term, 1983

LARRY VAN EMMERIK, for Himself, and
All Others Similarly Situated,
Petitioner,

vs.

MONTANA DAKOTA UTILITIES CO.,
a corporation, et al.,
Respondents,

and

LARRY VAN EMMERIK, for Himself and
All Others Similarly Situated,
Petitioner,

vs.

BLACK HILLS POWER AND LIGHT COMPANY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF SOUTH DAKOTA

STATEMENT OF THE CASE

For purposes of clarity the format of petitioner's Statement of the Case will be followed in this brief.

I. Sales Tax Legislation

The 1980 South Dakota Legislature passed Senate Bill 40, a bill which enacted a retroactive tax of 5% on the gross receipts received from the sale of utilities within the State of South Dakota. That statute was challenged by petitioners in an action described as Van Emmerik III,

in petitioner's brief. The statute was upheld by the South Dakota Supreme Court. *Van Emmerik v. Janklow, et al.*, 304 N. W. 2d 700 (SD 1981). This court declined to hear an appeal concerning the merits of that legislation. 454 U. S. 1131, 71 L. Ed. 2d 285, 102 S. Ct. 986.

II. Excess Tax Collections

The passage of Senate Bill 40 by the 1981 South Dakota Legislature and its subsequent approval by the judicial system established the sales tax rate on South Dakota utilities for the period in question in this litigation at 4% for the period through July 1, 1980 and 5% thereafter. Those rates resulted in revenue to the state in an amount that equalled those taxes actually received from the consumer by the utilities, therefore effectively negating any claim that tax collections made during the pertinent time period were excessive.

III. Van Emmerik and Related Litigation

(A) Van Emmerik I

The first of plaintiff's several lawsuits was initiated in March, 1979, naming as defendants several South Dakota State officials and a class of utility suppliers, none of whom were named or served at the time. The complaint alleged a cause of action for overpayment of sales taxes. (A complete copy of plaintiff's complaint is reproduced in Appendix A.) Plaintiffs did not seek to amend their complaint to allege a violation of 42 USC § 1983 or to claim attorneys' fees under 42 USC § 1988. Plaintiffs did amend their complaint to include 2 of their 106 suppliers of utilities within the State of South Dakota as defendants. After the trial court denied plaintiff's

claims, the South Dakota Supreme Court ruled against petitioners, denying Van Emmerik's claims for damages against the State of South Dakota, on the grounds of sovereign immunity and a lack of standing. The court recognized but did not resolve various issues relating to plaintiff's failure to exhaust all remedies. However, the court held that, because of the derivative nature of plaintiff's claim, plaintiff could not recover any amounts in excess of the amounts which could be received by the various utilities involved in the litigation. 298 N. W. 2d at 807.

On remand, the case was resolved by summary judgment in favor of defendants. Significantly, on remand plaintiffs did not seek to amend Van Emmerik I to seek relief and attorneys' fees under 42 USC § 1983 and § 1988. The trial court's summary judgment was affirmed on appeal. *Van Emmerik v. Montana Dakota Utilities Co., et al.*, 332 N. W. 2d 279 (SD 1983). Throughout Van Emmerik I none of the other 104 suppliers of utility service within the State of South Dakota were ever made parties to the litigation.

(B) The Utilities' Tax Refund Case

Six investor owned utilities doing business in South Dakota filed a refund claim in June of 1979, several months before any utilities were named as defendants in Van Emmerik I. The claim filed by those utilities demanded a refund for tax overpayments for the proceeding three years. Ultimately, the South Dakota Supreme Court ruled in favor of the utility companies and remanded the action to the Circuit Court for determination of the size of the refund. In the *Matter of the Sales Tax Refund Applications*, 298 N. W. 2d 799 (SD 1980).

The effect of this action was later rendered moot by Senate Bill 40, as mentioned above, which retroactively validated all taxes already paid to the State of South Dakota.

(C) Van Emmerik II

Van Emmerik II was commenced after the refund case had been brought by the utility companies. Although premised on the same factual basis as Van Emmerik I, this second action named numerous individual utilities as defendants and excluded the State of South Dakota and its officials who had been named in Van Emmerik. For the first time, municipally owned electric utilities and rural electric cooperatives were included with the investor owned utilities as defendants. The case lay dormant until January, 1981, two months after a favorable ruling in the *Matter of Sales Tax Refund Applications,* supra. At that time, Van Emmerik amended his complaint to claim a violation of 42 USC § 1983. The case was ultimately dismissed on summary judgment; at no point in the litigation was relief of any sort granted. The enactment of Senate Bill 40, and the decisions in the refund case referred to above disposed of the dispute concerning the proper rate of sales tax. It should be noted that the South Dakota Supreme Court failed to attach any significance to Van Emmerik II in its decision denying attorneys' fees in the present.

(D) Van Emmerik III

The case of *Van Emmerik v. Janklow, et al.*, 304 N. W. 2d 700 (SD 1981) was brought by petitioners seeking a judgment declaring that Senate Bill 40, as passed by the

1980 South Dakota Legislature was unlawful. As noted above, the South Dakota Supreme Court disposed of Van Emmerik's claim by determining that the retroactive sales tax legislation contained in Senate Bill 40 was constitutional. With that finding, any fund that may have been available for refund to the utilities under the procedures cited by the South Dakota Supreme Court in the utility refund case, 298 N. W. 2d 799, 803 was extinguished. The only conceivable saving that thus may have been realized was the reduction in sales tax rates for the period from December, 1980, through May, 1981. That saving would have accrued to individual consumers and would have resulted in "no benefit accruing to the utilities as a result of (Van Emmerik's) lawsuit." 332 N. W. 2d at 238. Although taxpayers were subject to a lower rate of taxation for a short period of time, the amounts of any saving have never been determined.

IV. Reasons for Denial of Writ

Plaintiff seeks to claim attorneys' fees for all of the Van Emmerik cases referred to above pursuant to 42 USC § 1988. As noted before, the only action which can be claimed to have had any impact whatsoever on the plaintiff class, Van Emmerik I, did not make any claim for relief pursuant to 42 USC § 1983 and did not allege any constitutional violation; instead, that case appears to have been intended merely as a derivative action for a sales tax refund. The mere fact that plaintiffs sought to promote a theory which they perceived to be in the public interest did not automatically allow a grant of attorneys fees. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975).

Plaintiff's reliance on *LaRaza Unide of Southern Alameda County v. Volpe,* 440 F. Supp. 94, is misplaced. In that action plaintiffs alleged a violation of the Relocation Assistance Act, a federal statute. The District Court merely held that this court's ruling in *Alyeska,* supra, was not applicable to an action alleging a violation of a specific federal act as well as violations of due process and equal protection. Because Van Emmerik I never raised any claim that a refund should be granted because of the "deprivation of any rights, privileges, or immunities secured by the constitution and laws" as provided by 42 USC § 1983, the *LaRaza Unide* decision would be inapplicable. As can be seen from a reading of the complaint in Van Emmerik I (attached in the appendix hereto), that action was litigated solely to seek a construction of a state sales tax statute and never rose to the level of 42 USC § 1983.

Similarly, plaintiff relies upon *Gumbhir v. Kansas State Board of Pharmacy,* 646 P. 2d 1078 (K. 1982) to establish that plaintiff need not have specifically and properly pleaded a § 1983 violation. In that case, plaintiff had a violation of various rights guaranteed by the United States Constitution. The Kansas Supreme Court held that because certain constitutional violations had been plead, 42 USC § 1983 did not need to be specifically plead to trigger a possible recovery of attorneys fees under 42 USC § 1988. *Gumbhir* is distinguishable because the plaintiff in that case at least alleged several constitutional violations.

Had plaintiff here originally claimed a violation of 42 USC § 1983, he might conceivably have made a claim that would have triggered an award of attorneys fees un-

der 42 USC § 1988. However, plaintiff can point no theory of law which would authorize a grant of attorneys fees in a state tax refund action which raised no question of federal law. If plaintiffs generally were allowed to proceed as Van Emmerik wants to do here, any plaintiff could commence an action and, after conclusion of that action, claim that his cause of action actually arose under 42 USC § 1983 and then seek attorneys fees.

Van Emmerik must show that he has somehow prevailed in Van Emmerik II in order to make a valid claim for attorneys fees, which he has utterly failed to do. Van Emmerik II was not amended to allege a violation of 42 USC § 1983 until two months after the current defendants had prevailed in their refund litigation. In the *Matter of the Sales Tax Applications*, supra. A summary of the proceedings in Van Emmerik II shows the following progression. The complaint was filed in February 1980; the complaint was amended to allege a violation of 42 USC § 1983, in January, 1981; summary judgment was granted in favor of defendants on all issues in September of 1981; plaintiff appealed on the merits; the appeal was rejected by the South Dakota Supreme Court. Plaintiff chose not to petition this court for certiorari on the merits, but instead appealed only the question of attorneys' fees, thus cutting adrift any possible chance for prevailing on the merits. It is difficult to equate that progression with the proposition that plaintiff somehow prevailed on any theory in the Van Emmerik II litigation and is, therefore, entitled to an award of attorneys fees.

Further, neither the State of South Dakota nor any state officials were named as defendants in the Van Em-

merik II litigation. At the time that litigation was brought, the state was imposing a tax on utilities at a rate which was determined to be unlawful. The higher, and incorrect, rate was passed through to consumers (Petition for Writ of Certiorari, p. 18). As noted in the complaint and in numerous arguments before various courts, the utility companies were only a conduit collecting a tax from their consumers and paying those tax collections to the state treasury. Because neither the state nor any state officials were named as parties in Van Emmerik II, petitioner has turned to the admittedly innocent utilities to reward the attorneys for their efforts. None of the cases cited on pages 19 and 20 of the petition for certiorari support such a novel theory. To the contrary, each decision cited by petitioner is clear in holding that attorneys' fees are awarded because, in some way, a constitutionally guaranteed right was assured by a plaintiff's willingness to "take on the system." In none of those cases could the defendants against whom attorneys fees were sought have been characterized as innocent conduits. Van Emmerik now seeks to make a claim against the utilities because he failed to properly include defendants who could be shown to have benefited from a change in the sales tax rates.

The Van Emmerik cases have failed to make any impact upon the plaintiff, the class he purports to represent, or the State of South Dakota. The possible benefit received from the plaintiff's class should instead be attributed to the case of in the *Matter of the Sales Tax Refund Applications*, supra, which decision actually lowered the sales tax rates in question for a short period of time. It would be incongruous to hold that the utility companies who properly acted to claim a refund, only to see that re-

fund erased by later legislation, should now be required to pay Van Emmerik's attorneys fees. Instead, Van Emmerik ought to look either to the plaintiff class or the State of South Dakota for payment of his attorneys fees.

V. Conclusion

For the reasons mentioned above, the Petition for Writ of Certiorari should be denied.

Dated this 19th day of September, 1983.

Respectfully submitted,

MAY, ADAM, GERDES & THOMPSON
By: /s/ BRENT A. WILBUR
Attorneys for Respondents

503 South Pierre Street
P. O. Box 160
Pierre, South Dakota 57501
(605) 224-8803

ROBERT B. FRIEBERG
Box 511
Beresford, South Dakota 57004
(605) 763-2107

LEO P. FLYNN
Box 505
Milbank, South Dakota 57252
(605) 432-6611

APPENDIX

IN CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT

State of South Dakota, County of Hughes, ss

LARRY VAN EMMERIK, for himself and for all others similarly situated,

Plaintiff,

vs.

THE STATE OF SOUTH DAKOTA, DAVID VOLK, State Treasurer of South Dakota; STEVEN J. ZELLMAN, Secretary of Revenue of the State of South Dakota:

and

A class consisting of all individuals, partnerships, associations, or corporations who or which have, since January 1, 1976, engaged in the sales, furnishing or service of gas, electricity or water to consumers or users in the State of South Dakota,

Defendants.

COMPLAINT

I.

THE PLAINTIFF AND THE CLASS OF PLAINTIFFS

1.01 Plaintiff is a resident of South Dakota. During the three years last past he has paid, as part of his "utility" bills for gas and electricity, an added item of four percent (4%) of the total bill, represented to be the South Dakota state sales tax thereon.

1.02 The class of plaintiffs whom the named plaintiff seeks to represent consists of all residents of South Dakota who have, since January 1, 1976, paid as an added item on their utility bills for gas and electricity, four percent (4%) of the total, represented to be the South Dakota sales tax thereon.

II.

THE DEFENDANTS—STATE OF SOUTH DAKOTA

2.01 The State of South Dakota has consented to be sued by SDCL 10-45-53.

2.02 The defendant Volk, State Treasurer, is joined because funds derived from sales tax are paid over to him.

2.03 The defendant Zellman is joined because he is charged by law (SDCL 10-45-53) with responsibility for making refund of sales tax paid when not due. This Complaint constitutes a claim for refund, on behalf of the plaintiff and all members of the plaintiff class, of the difference between four percent and three percent (4% and 3%) of their utility bills paid since January 1, 1976.

III.

THE DEFENDANT—UTILITY COMPANIES

3.01 All utility companies engaged in the sales, furnishing or service of gas, electricity or water to consumers in South Dakota are joined as a class as defendants.

3.02 Said utility companies are not under statutory or other obligation to claim any tax refunds for the benefit of the plaintiff class, and have no financial interest in doing so. Accordingly, they are joined as defendants.

3.03 No monetary judgment is sought against the utility companies.

IV.

THE SALES TAX CONTROVERSY

4.01 Prior to 1969, a sales tax of three percent (3%) was levied on sales of tangible personal property (SDCL 10-45-2). A separately stated tax of three percent (3%) was levied on gross receipts from furnishing gas, electricity or water (SDCL 10-45-6).

4.02 By Chapter 267, Laws of 1969, SDCL 10-45-2 was amended so as to increase the sales tax on tangible personal property to four percent (4%). No such amendment was made with respect to the rate on utility bills, SDCL 10-45-6. Copy of Chapter 267, Laws of 1969, is attached marked Exhibit "A".

4.03 By Chapter 97, Laws of 1974, SDCL 10-45-6 was amended in other respects, but the three percent (3%) rate was not only left undisturbed, but was affirmatively re-enacted. Copy of Chapter 97, Laws of 1974, is attached marked Exhibit "B".

V.

MISINTERPRETATION OF THE LAWS

5.01 The Attorney General of South Dakota, in 1969, mistakenly concluded that Chapter 267, Laws of 1969, served to increase the sales tax on utility bills from three percent to four percent (3% to 4%). See Exhibit "C" attached hereto.

5.02 Pursuant to this mistaken interpretation, the officials of South Dakota have continued to demand and collect a four percent (4%) sales tax from all utility companies operating in the state.

5.03 Such utility companies, having no financial stake in the matter, have charged the four percent (4%) rate to their customers, all of whom are members of the plaintiff class, and the utilities have remitted the same to the state, as required by SDCL 10-45-22.

5.04 Since 1976, plaintiff is informed and believes that the state has collected in excess of $21,000,000.00 in sales taxes from the defendant utilities, of which over $5,254,000.00 has been collected without authority in law, and by mistake.

5.05 This erroneous and unlawful collection of four percent (4%) instead of three percent (3%) on utility bills will continue unless restrained by decree of this court.

VI.

NECESSITY FOR CLASS ACTION

6.01 The persons constituting the plaintiff class number many thousands so as to make it impracticable to bring them all before the Court.

6.02 The character of the right sought to be enforced for the plaintiff class is secondary in the sense that the primary right belongs to the utility companies, who have no financial interest in enforcing same.

6.03 There is a common question of law affecting the several rights of the plaintiff class and a common relief is sought.

6.04 It would require a suit by each member of plaintiff class to compel the defendant utility companies to file a claim for refund under 10-45-53. This would result in a multiplicity of actions.

6.05 The amount due each member of plaintiff class is relatively small and when compared with costs of suit, would discourage individual legal action. Unless this class action is permitted, the state defendants would be unjustly enriched at the expense of the plaintiff class.

VII.

INJUNCTION

7.01 Unless restrained, defendant state and its officers will continue to demand collection and payment of the four percent (4%) tax.

7.02 Unless protected by Order of Court, the defendant utility companies will continue to collect and remit the four percent (4%) tax.

7.03 Individual plaintiff is without adequate remedy at law because costs of suit are disproportionate to individual recoveries.

IMPLIED TRUST

8.01 The state defendants, as a direct and proximate result of the illegal or mistaken collections of four percent (4%) sales tax instead of three percent (3%) sales tax, has gained in excess of $5,250,00.00 (sic) from the plaintiff and other taxpayers of this state who are similarly situated, which money rightfully belongs to the said plaintiff class and said class of taxpayers have a legal and better right to said funds than the defendants, as a result of which, this Court should impose an Implied Trust upon said fund for the benefit of the plaintiff class of taxpayers, which implied trust is authorized by the provisions of SDCL 55-1-8.

IX.

REFUND OR CREDIT

9.01 Although individual refunds to each member of the plaintiff class would necessitate tremendous expenditures of time, effort and money, the defendant utilities have all of the records, equipment or facilities to make a reasonable determination as to the amount to which members of the plaintiff class are entitled by way of refund.

9.02 Substantial justice could also be accomplished by ordering a credit to be given each utility customer against taxes due or to become due in the future, which remedy is authorized by provisions of SDCL 10-45-53.

X.

ATTORNEY FEES AND EXPENSES

10.01 If this suit is successful, counsel for plaintiff class will have been instrumental in creating a fund of several millions of dollars for the benefit of plaintiff class.

10.02 The fund so created should be caused to pay:

(a) Reasonable fees and expenses of plaintiff's counsel.

(b) Reasonable expense of the defendant utility companies in furnishing information to the Court and in carrying out the refund decree.

XI.

WHEREFORE, Plaintiff prays for judgment as follows:

11.01 That the lawful rate of taxation of gross receipts from sales, furnishing or service of gas, electricity or water under SDCL 10-45-6 be decreed to be three percent (3%) and no more.

11.02 That the state defendant and defendant utility companies be enjoined and restrained from imposing, exacting or collecting from consumers any state sales tax in excess of three percent (3%), for a period of time until the relief decreed herein is accomplished.

11.03 That an appropriate decree be entered directing the refunds of excess sales tax mistakenly collected during the past three years to customers of the defendant utilities companies, either by means of credit on current or future bills, or by direct refund to members of the plaintiff class of those sums illegally paid by said taxpayers.

11.04 That the Court recognize the public interest and significant public benefits conferred upon the plaintiff class, and make an appropriate allowance for fees

and expenses of plaintiff counsel and for expenses of the defendant utilities companies in connection herewith.

Dated this 15th day of March, 1979.

MAY, JOHNSON, DOYLE, BECKER & FISHER, P.C.

By: /s/ GALE E. FISHER
412 West Ninth Street
P. O. Box 1443
Sioux Falls, South Dakota 57104

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS

By: /s/ GEORGE A. BANGS
818 St. Joe Street
P. O. Box 2670
Rapid City, South Dakota 57709